

October 16, 1997

**OFFICE OF THE HEARING EXAMINER**  
**KING COUNTY, WASHINGTON**

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**REPORT AND DECISION ON APPEAL FROM NOTICE AND ORDER**

**SUBJECT:** King County Department of Development and Environmental Services  
File No. **E91C1282**

**BEN SEBASTIAN**  
Code Enforcement Appeal

Location: 15225 – 88<sup>th</sup> Avenue NE

Appellant: Ben Sebastian  
9327 – 10<sup>th</sup> Avenue SE  
Everett, WA 98208

**SUMMARY OF DECISIONS:**

Department's Preliminary Recommendation	Deny
Department's Final Recommendation	Deny
Examiner's Decision:	Grant, in part

**PRELIMINARY MATTERS:**

Notice of appeal received by Examiner:	August 6, 1996
Statement of appeal received by Examiner:	August 6, 1996

**EXAMINER PROCEEDINGS:**

Pre-Hearing Conference:	July 8, 1997
Hearing Opened:	September 30, 1997
Hearing Administratively Continued:	September 30, 1997
Hearing Closed:	October 10, 1997

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

**ISSUES ADDRESSED:**

- Wetlands
- Grading
- Site Restoration

**FINDINGS, CONCLUSION AND DECISION:**

## FINDINGS:

1. On July 11, 1996 the Department of Development and Environmental Services (hereinafter, the “Department” or “DDES”) served upon Ben Sebastian (the “Appellant”) a notice of code violations, civil penalty and abatement order and notice of lien (“Notice and Order”). Citing KCC 16.82 (grading permit requirements) and KCC 21A.24 (sensitive area regulations), the Notice and Order identifies and orders correction of the following asserted code violations:

- Road construction, clearing and grading in a sensitive area (wetland) without the required permit(s) and inspections/approvals.
- The placement of fill in a sensitive area (wetland).

Consequently, the Notice and Order commands Appellant Sebastian to accomplish the following:

Apply for and obtain a valid clearing/grading permit. The application must be complete and include a site restoration plan for the wetland, including the removal of fill materials, re-vegetation of native plants and erosion controls.

2. The Appellant had attempted to develop a lot containing a wetland in a manner in which he believed was the most environmentally sensitive approach. As it turns out, the Department does not agree with regard to the environmental sensitivity of the Appellant’s approach. Worse, the Appellant’s work—the installation of approximately 1400 cubic yards of fill in order to construct an approximately 5000 square foot road extending to the back portion of the lot—was accomplished without required County permits issued and enforced by the Department.

On July 19, 1996, Appellant Sebastian timely filed an appeal, arguing the following:

It is Mr. Sebastian’s position that this decision is in error. In particular, it is Mr. Sebastian’s position that he did apply for a King County clearing/grading permit. The application was complete and included a site restoration plan which was worked out between the County and Roger Del Moral, Ph.D., a wetlands biologist acting on Mr. Sebastian’s behalf. Based upon information and belief, King County staff had approved of that site restoration plan. Subsequently, a new ecologist was assigned to the case by King County, and the new ecologist refused to agree to the site restoration plan which had been proposed by Dr. Del Moral.

The Appellant argues further that the site has already been substantially restored through natural processes; that his proposed site restoration plan provides for complete restoration of the disturbed area as a wetland in a manner equal to the former quality of the disturbed area; and, that the restoration plan which the County seeks (complete removal of all fill) will result in significant change and disturbance to the existing wetlands, and will otherwise serve no useful purpose. Finally, the Appellant argues that the Department’s approach is not only “not cost effective”, but also will visit upon the Appellant extreme economic hardship.

3. The parties agree that the landfill is located within some portion of a regulated wetland on the property and was improperly placed without permits. They disagree, however, regarding the extent of the violation; that is, the volume of the fill placed, the area of wetland covered, and the length of road created by the cited fill. As a result, this case asks the Examiner to rule not merely on whether the violation occurred, but rather, on the appropriateness of the Department’s restoration plan requirements (or, put another way, the adequacy of the Appellant’s restoration plan). The heart of this case, then, is this: Does the Appellant’s proposed restoration

plan (referred to in this hearing record as the “Del Moral Plan”), combined with “natural processes” comply with the King County code? A corollary issue: Will the County’s requirement to completely remove the fill result in destruction of the restoration which has occurred to date, thereby creating more harm ?

4. Addressing the issue described in finding no. 3, preceding, the Department cites KCC 21A.24.340.A which requires wetlands which have been altered without specific permission or approval by King County to be “replicated” as to configuration, depth, width, length, gradient, soil type, and soil type configuration, and so on.

The Appellant, however, cites KCC 21A.24.340.B, which states:

The requirements in subsection A. may be modified if the Applicant demonstrates that greater wetland functions can otherwise be obtained.

The Department argues that the Appellant improperly uses KCC 21A.24.340.B by comparing the Del Moral restoration plan and the Department’s restoration requirements to **existing conditions** instead of **pre-violation conditions**.

5. The Appellant further cites KCC 21A.06.750 which defines mitigation.. This definition suggests “minimizing” the impact of a measure, “rectifying the impact by repairing, rehabilitating, or restoring the affected sensitive area or buffer”; “reducing or eliminating an impact” over time by preservation or maintenance; and similar measures. However, KCC 21A.24.340, although titled “mitigation requirements,” actually does not address mitigation. Instead it demands “restoration” and “replication”.

6. The three principal wetland functions by which the Department appraises the value of a wetland are these: hydrologic value (commonly, flood storage; also, surface or sub-surface water flow patterns); wildlife habitat value; and, biotic diversity, particularly with respect to hydrophytic vegetation. The Appellant’s plan approaches the wetland values in these ways:

- A. The Appellant contends that the original hydrological patterns appear not to have been noticeably affected, based upon three years experience and observation. Nonetheless, the Del Moral plan calls for creating twelve small trenches across the road in the lowest elevations to completely establish wetland hydrology.
- B. Regarding vegetation, the Appellant argues that most of the road site has been reclaimed by natural processes. The Del Moral plan nonetheless proposes the planting of specific willows, dogwoods, red cedars, oregon ash, and similar species. In addition, the Del Moral plan calls for cutting back Himalayan blackberry plants and removal of rhizomes (root stalk).
- C. Bio-filtration to achieve water quality depends substantially upon nutrient removal. The nutrient removal capability of a wetland is significantly affected by the “residence time” within that wetland. The bio-filtration capability of this wetland (“moderate”) is due to the long residency of waters, not to the maturity or bio-diversity according to the Appellant’s wetland scientist/planner (Del Moral). Thus, the Appellant argues, the volume of the driveway (that is, the displacement of the wetland) has had a “negligible effect upon bio-filtration capacity.” This testimony is un rebutted.

#### CONCLUSIONS:

1. Because the Appellant concedes the violation (finding no. 3, above) there is not an issue in this case regarding whether the violation occurred. It did.

2. The crux of this case, then, centers upon the appropriateness or acceptability of the Appellant's "Del Moral" plan to satisfy the Notice and Order which commands the Appellant to apply for and obtain all required grading permits and/or approvals "with a restoration plan" which addresses "the removal of all fill material, re-vegetation of native plants, and erosion controls. Another way of stating the issue is: Does KCC 21A.24.340 (wetland mitigation) **require** total removal of all fill material, or may this requirement "be modified if the applicant demonstrates that greater wetland functions can otherwise be obtained.? More specifically, does the Del Moral plan demonstrate greater wetland functions than can otherwise be obtained? The answer lies in conclusion no. 3, below.

3. With respect to hydrology, it appears obvious and logical that Dr. Del Moral is correct when he claims that when his plan is implemented, the pre-development and post-development hydrological impacts will be "negligible". This achievement, however, fails to meet the KCC 21A.24.340.B standard of achieving "greater wetland functions".

The bio-filtration capacity of the Del Moral plan also appears to be a "wash"; that is, no greater than, nor worse than, the pre-existing condition. Dr. Del Moral's claim that the bio-filtration capability of this wetland comes more from the passing water "residency" than from vegetative character (even before the cited land filling) is unchallenged in this hearing record.

The Appellant proposes to import substantial bio-diversity to enhance the site. The evidence suggests that the planting plan recommended by Del Moral will certainly improve bio-diversity and wildlife habitat over presently existing circumstances and, probably, over pre-existing circumstances—although neither side has argued this point very well. Even if the Examiner takes notice of the generally accepted principal that wetlands provide greater bio-diversity than uplands, one may reasonably assume that this principal, too, is a function of the planting plan composition (whether it be mother nature's plan or Dr. Del Moral's). For this reason, the Del Moral plan may be regarded as superior to pre-existing conditions with respect to wildlife support. If it is not, then DDES certainly has the authority to ask Dr. Del Moral to select additional plantings of additional species.

4. Taking the three paragraphs of finding 3, above, on net, it is concluded that the Del Moral plan indeed demonstrates greater wetland functions than can otherwise be obtained—not in each and every category of review, but certainly on average, on net (that is, *remaining* after all deductions have been made). For this reason that portion of the appeal which addresses the acceptability of the Appellant's proposed mitigation plan should be granted.

5. Regarding other elements of the appeal:

A. The Notice and Order will not be dismissed because, if for no other reason, the Appellant has agreed that the violation did indeed occur.

B. There is no need to waive any and all civil penalties in as much as this hearing record shows that none have accrued.

C. It is a mystery why the contractor, James Berg and Associates, has not been cited by the Department at some time during the past few years of dispute regarding this property. The evidence available in this hearing record certainly justifies citation of James Berg and Associates. However, that issue is not before the Examiner and no ruling will be made here.

DECISION:

The violation occurred. The Notice and Order issued By the Department was correctly issued. The Department acted properly within the authority of KCC 16.82 and KCC 21A.24 when it ordered the Appellant to apply for and obtain a valid clearing/grading permit; and, when it ordered the Appellant to prepare an application which included a site restoration plan.

The Department need not have required in its Notice and Order, however, “the removal of fill materials” if that is meant to encompass *all* fill materials. Instead, the Notice and Order could have, and should have, given the Appellant opportunity to comply with the application requirement consistent with KCC 21A.24.340.B, which requires “modification” of the “replication” standards contained in KCC 21A.24.340.A. The Appellant should have the right to seek compliance with KCC 21A.24.340.B. The Notice and Order did not offer it to him. This decision STRIKES that portion of the Notice and Order. To that extent only, the appeal is GRANTED; SUBJECT to the order which follows below.

**ORDER:**

- A. The Appellant shall resubmit to the Department the “Del Moral Plan”, or a substantially similar plan, within thirty days following the date of this order, together with all required application and review fees then due;

**OR**

Shall be subject to the penalties and enforcement measures described in the Department’s July 11, 1996 Notice and Order.

- B. Within thirty days following submittal of the Appellant’s restoration plan, the Department shall indicate in writing to the Appellant whether the plan is accepted or whether additional planting, or additional planting species, is/are required in order to obtain habitat/bio-diversity “greater than” the pre-existing conditions.
- C. If additional plan improvement is required pursuant to paragraph B. of this order, then the enhanced plan shall be submitted within thirty days following the Department’s notification to the Appellant regarding planting plan (wildlife habitat/bio-diversity) deficiencies.
- D. The plan shall be physically implemented within the normal period authorized for remedial plans. The Department shall communicate in writing to the Appellant the completion deadline at the time of final restoration plan approval. Failure to comply with that deadline shall be cause for issuance of a new Notice and Order.

ORDERED this 16<sup>th</sup> day of October, 1997.

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R. S. Titus, Deputy  
King County Hearing Examiner

TRANSMITTED this 16<sup>th</sup> day of October, 1997, to the parties and interested persons indicated on Attachment A:

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding code-enforcement appeals.

MINUTES OF THE SEPTEMBER 30, 1997, PUBLIC HEARING ON DDES FILE NO. E91C1281 – SEBASTIAN: R. S. Titus was the Hearing Examiner in this matter. Participating at the hearings were Fred White, Mason Bowles, Peter Demming, Ben Sebastian, and Roger Del Moral.

On September 30, 1997, the following exhibits were offered and entered into the hearing record:

- Exhibit No. 1 Department of Development and Environmental Services, staff report to the King County Hearing Examiner, for E91C1282-Sebastian, dated September 30, 1997
- Exhibit No. 2 Copy of Notice and Order, dated July 11, 1996
- Exhibit No. 3 Copy of appeal statement, dated July 29, 1996
- Exhibit No. 4 Interoffice memo, undated, from James Tracy, to Bruce Engell, describing site Investigation
- Exhibit No. 5 Letter, undated, from James Tracy, to Roger Del Moral
- Exhibit No. 6 March 30, 1992: King County letter to applicant requesting further information
- Exhibit No. 7 August 6, 1992: King County letter to applicant requesting further information
- Exhibit No. 8 November 4, 1994: Del Moral's Wetland Mitigation Plan
- Exhibit No. 9 March 11, 1996: King County letter to applicant requesting further information
- Exhibit No. 10 September 19, 1996: Letter from consultant Del Moral to Peter Demming
- Exhibit No. 11 October 3, 1996: Letter from Peter Demming to Mason Bowles
- Exhibit No. 12 October 17, 1996: Interoffice memo from Mason Bowles to Sherrie Sabour
- Exhibit No. 13 September 22, 1997: Testimony synopsis, from Mason Bowles, to Hearing Examiner
- Exhibit No. 14 June 10, 1991: Del Moral wetland delineation and evaluation/Sebastian property
- Exhibit No. 15 March 20, 1992: Environmental checklist
- Exhibit No. 16 May, 1996: Wetland & buffer functions assessment, Cooke Scientific Services
- Exhibit No. 17 April 1996: Water quality guidelines for wetlands, WSDOE
- Exhibit No. 18 July 1997: The economic value of wetlands, WSDOE
- Exhibit No. 19 July 23, 1989: King County wetland inventory for Sammamish River 99
- Exhibit No. 20 September 1997: GIS map of Sebastian property
- Exhibit No. 21 October 29, 1991: 8 photos taken of site by Mason Bowles
- Exhibit No. 22 Aerial photo of Sebastian property (with annotations)
- Exhibit No. 23 Sebastian witness list and 22 attached exhibits (#23-1 through #23-22)
- Exhibit No. 24 19 photos of site vegetation taken by Roger Del Moral 9-26-97

attachment  
RST:vam/cp

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